EARTHJUSTICE

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Melissa A. Hoffer
Acting General Counsel
Principal Deputy General Counsel
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202.440.1671
hoffer.melissa@epa.gov

BY ELECTRONIC MAIL

Dear Ms. Hoffer:

The Pawnee Nation of Oklahoma appreciates the opportunity to submit these comments regarding the October 1, 2020 Environmental Protection Agency (EPA) decision that grants the State of Oklahoma authority to administer 26 environmental programs on Indian lands in Oklahoma pursuant to Section 10211 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA) (the October 1 Decision).

The October 1 Decision violated the law and was arbitrary and capricious for at least four reasons.[1] First, EPA granted Oklahoma's request even though, under well-established precedent, Section 10211 of SAFETEA (the Rider) should be presumed to have expired. SAFETEA was a time-limited appropriation and authorization act that expired in 2009, and there is a strong presumption that riders in such acts—like Section 10211—are temporary legislation that do not remain in effect after the acts' expiration. EPA failed to consider this presumption: it never addressed the presumption or analyzed its application to the Rider. EPA also failed to consider or apply the federal Indian law canon of construction that statutes must be construed in favor of Indians, which further indicates that the Rider has expired. Indeed, EPA provided no reasoned explanation for why it believed that the Rider remains in effect. We believe Oklahoma's request should have been denied because the Rider had expired.

Second, even if EPA believed that the Rider remains in effect, the text of the Rider requires EPA to determine, before approving Oklahoma's request, whether each of the 26 Oklahoma environmental programs "meets applicable requirements of the law." SAFETEA, Pub. L. No. 109-59, 119 Stat. 1144, 1937 (Aug. 10, 2005). EPA violated SAFETEA by approving Oklahoma's request without making these findings.

[1] The October 1 Decision also raises serious constitutional and tribal sovereignty concerns. However, for purposes of these comments, we focus on the administrative deficiencies in EPA's decision.

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Third, EPA ignored that it has the authority to impose appropriate conditions on any approval of Oklahoma's request, pursuant to Oklahoma Dep't of Envtl. Quality v. EPA, 740 F.3d 185, 190 (D.C. Cir. 2014). EPA's failure to consider imposing potential conditions was arbitrary and capricious.

Finally, EPA granted Oklahoma's request without providing any public notice and comment, engaging in any meaningful consultation or coordination with the Pawnee Nation and other affected Oklahoma tribes, or analyzing the environmental impacts of its approval. This was unlawful: notice and comment, tribal consultation, and environmental analyses are legal requirements that apply to EPA's approval of state environmental programs, and EPA should not have disregarded these requirements.

Because of these significant legal violations, the Pawnee Nation respectfully asks that the EPA (1) withdraw the October 1 Decision and (2) review and reconsider Oklahoma's SAFETEA request with a full and robust process that addresses the interests of tribal nations and the public. This process should include, for example, full government-to-government consultation with all Oklahoma tribes, a public comment period, and a National Environmental Policy Act (NEPA) analysis. Moreover, EPA should evaluate whether the Rider is still in effect, including addressing the strong presumption that appropriation and authorization riders such as Section 10211 are temporary legislation and applying the principle that statutes must be construed in favor of Indians. EPA should also address whether, for each of the programs covered by the October 1 Decision, Oklahoma's program meets the applicable requirements of federal environmental law, as mandated by SAFETEA.

For any approval of Oklahoma's request, EPA should consider and impose appropriate conditions. The Pawnee Nation would welcome the opportunity to coordinate with EPA regarding conditions that may be appropriate here.

BACKGROUND

A. The McGirt v. Oklahoma decision

On July 9, 2020, the United States Supreme Court held in McGirt v. Oklahoma that lands guaranteed by treaty to the Muscogee (Creek) Nation remain Indian country for purposes of the Major Crimes Act. 140 S. Ct. 2452, 2459 (2020). This decision affected a substantial area of northeastern Oklahoma where the state had for many years been exercising jurisdiction to prosecute crimes. In holding that these lands remain Indian country, the Supreme Court noted that, in a series of treaties in the 1830s, the U.S. government "solemnly guarantied" "[t]he Creek country west of the Mississippi" to the Muscogee (Creek) Nation and "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians." Id. at 2459–60 (quoting treaties) (alterations in original). The Supreme Court held that the Creek Reservation persists today, and rejected Oklahoma's argument that the lands in question are under state criminal jurisdiction. Id. at 2460–74.

The Supreme Court also rejected Oklahoma's argument that there would be "potentially 'transform[ative]'" consequences from upholding the Creek's treaty rights. Id. at 2478. Oklahoma

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contended that such a ruling "might be used by other tribes to vindicate similar treaty promises" and "Oklahoma fears that perhaps as much as half its land . . . could wind up within Indian country." Id. at 2479. The Court recognized that its holding could have implications for other tribes' jurisdiction. But it held that "[e]ach tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek." Id.

Moreover, the Supreme Court rejected Oklahoma's claims that upholding the Creek's treaty rights would have "significant consequences" such as undermining past criminal convictions, adding burdens on federal and tribal courts, and disrupting settled expectations and practices under civil and regulatory law. Id. at 2478–82. The Court held that such concerns are not a license to disregard the law, and stated: "[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking." Id. at 2482. The Court observed: "[I]t is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners." Id. at 2481. The court noted, for example, that "[a]lready, the State has negotiated hundreds of intergovernmental agreements with tribes." Id.

In other words, the Court anticipated that Oklahoma could work collaboratively with tribes post-McGirt to resolve any jurisdictional and other issues. Id.

B. Oklahoma's request to assert environmental authority over Indian country

Oklahoma did not follow the Supreme Court's admonition to work with tribes. Instead, on July 22, 2020, less than two weeks after the McGirt decision, the Governor of Oklahoma submitted a request to then-EPA Administrator Andrew Wheeler requesting that EPA grant Oklahoma authority to administer all EPA-approved environmental programs in "areas of the State that are in Indian Country." Oklahoma did not give the tribes notice of its request, but it did apparently share its request with business interests in late July.[2]

In the July 22, 2020 letter, Oklahoma asserted that its request was "[c]onsistent with the extent to which the State of Oklahoma implemented environmental programs throughout the State prior to the U.S. Supreme Court's recent decision in McGirt v. Oklahoma." But Oklahoma's request extended well beyond the Muscogee (Creek) reservation to cover Indian lands statewide.

Oklahoma's request covered at least 26 different programs under six federal statutes: the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), the Clean Air Act (CAA), the Clean Water Act (CWA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the Toxic Substances Control Act (TSCA). The letter also stated that "[t]he State of Oklahoma reserves the right to amend this request or make future requests for approval" of programs in Indian country.

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[2] Ti-Hua Chang, EPA Set Secret Deadline for Oklahoma Tribes to Fight Loss of Sovereignty, TYT Magazine (Sept. 18, 2020), https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/7yzOow5PLu5kOpyfovH5ET.

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Oklahoma made its sweeping request pursuant to a legislative rider (the Rider) attached at the last minute by Senator James Inhofe to a 2005 transportation appropriation and authorization bill known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA), Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005). This Rider was inserted towards of the end of the 836-page SAFETEA bill after the House and Senate had agreed on the bill's final version.[3] It also bypassed consideration by the Senate Indian Affairs Committee, which would have typically been the proper place for the amendment to be debated.[4] The Rider passed without notice to Oklahoma tribes, EPA, or the Oklahoma Governor.[5] As then-Principal Chief of the Cherokee Nation Chad Smith stated, the Rider "was really a midnight rider . . . [i]t avoided all the process of good policy and legislative development."[6]

There is no apparent legislative history for the Rider. However, news reports suggest that Senator Inhofe inserted the Rider into the bill at the urging of the Oklahoma Independent Petroleum Association (OIPA) and the oil and gas industry.[7] The Rider came a few months after the EPA had approved the Pawnee Nation's application for Treatment as a State to administer certain Clean Water Act programs over OIPA's objections.[8] A Pawnee Nation attorney referred to the Rider in 2005 as "the most scary, direct, take-the-gloves-off-and-go for-the-jugular attack on tribal sovereignty [he had] ever seen."[9]

As relevant here, the Rider stated:

> OKLAHOMA. - Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the "Administrator") determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect

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[3] Charles G. Curtis Jr. et al., Tribal "Treatment As State" Programs Under Federal Environmental Statutes: Key Provisions And Case Studies, Best Practices For Protecting Natural Resources on Tribal Lands Leading Lawyers Provide Background and Legal Framework for Protecting Rights Over Tribal Natural Resources, Aspatore, 2015 WL 9194946 at *19 (Nov. 2015); Tony Thornton, Indian leaders hear complaints about legislation, The Oklahoman (Nov. 2, 2005 12:00 AM), https://www.oklahoman.com/article/2918130/indian-leaders-hear-complaints-about-legislation.

[4] Travis Snell, Tribal officials angry over transportation bill, Cherokee Phoenix (May 3, 2006), https://www.cherokeephoenix.org/Article/index/1417.

[5] Keith S. Porter, Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships, 16 Cornell J.L. & Pub. Pol'y 495, 530 (2007) (citing Thornton, Indian leaders hear complaints about legislation).

[6] Snell, Tribal officials angry over transportation bill.

[7] Id.; see Thornton, Indian leaders hear complaints about legislation.

[8] Thornton, Indian leaders hear complaints about legislation; Snell, Tribal officials angry over transportation bill.

[9] Thornton, Indian leaders hear complaints about legislation.

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> to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.

Section 10211(a), SAFETEA, Pub. L. No. 109-59, 119 Stat. 1144, 1937.

C. EPA's approval of Oklahoma's request

After receiving Oklahoma's July 22, 2020 request, EPA took more than a month to notify the Pawnee Nation and other affected tribes. On August 25, 2020, EPA sent a copy of Oklahoma's request to the Pawnee Nation and other Oklahoma tribes,[10] stating that the agency was "engaging your Tribal Nation in consultation and coordination." The letter committed that "[t]ribal consultation will be conducted in accordance with the EPA Policy on Consultation and Coordination with Indian Tribes."

EPA, however, did not follow its own consultation and coordination policies. In the August 25, 2020 letter, EPA stated that it would begin consultation by holding a conference call with the affected tribes on September 8, 2020. Then, agency allotted only one week—from September 8 to 15, 2020—for consultation meetings with individual tribes. Thus, despite making a decision affecting numerous tribes across Oklahoma that involved more than two dozen complex federal environmental programs, EPA allowed only three weeks for consultation with those tribes.

After its August 25, 2020 notice letter, EPA provided the Pawnee Nation with copies of the agency's consultation procedures. Pursuant to those procedures, the Pawnee Nation informed EPA that it wished to engage in formal government-to-government consultation, and requested additional information that it needed to formulate a position on Oklahoma's request and to meaningfully consult with EPA. For example, the Pawnee Nation sought more details on the extent to which its lands and authority would be affected by Oklahoma's request, how that request overlapped with lands affected by the Supreme Court's McGirt holding, documentation regarding whether the Rider continues to be in effect, and other material information.

On September 17, 2020, EPA responded with an email message informing the Pawnee Nation that the agency "has concluded the consultations." The EPA did not provide any of the information requested by the Pawnee Nation. And despite the Pawnee Nation's request, no consultation meeting with the tribe was held and no formal government-to-government consultation was initiated.

On September 30, 2020, EPA circulated to the Pawnee Nation and other tribes a "Summary Report of Tribal Consultation and Engagement" related to Oklahoma's request (EPA Summary Report). The following day, on October 1, 2020, EPA approved Oklahoma's request.

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[10] News reports indicate that not all Oklahoma tribal governments received EPA's August notice. See Ti-Hua Chang, EPA Set Secret Deadline for Oklahoma Tribes to Fight Loss of Sovereignty.

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EPA treated its approval of Oklahoma's request as a ministerial decision: its October 1 Decision runs just over six pages, with two of those pages devoted to listing the 26 programs being transferred to Oklahoma. The October 1 Decision did not evaluate the question of whether Section 10211(a) of SAFETEA even remained in effect.

EPA asserted that Section 10211(a) of SAFETEA applies to "(1) any regulatory program, (2) submitted by Oklahoma for approval by EPA under a law administered by EPA, where EPA has (3) determined that the program meets applicable requirements of the law, and (4) approved the program with respect to areas in the State that are not Indian country, and (5) the State requests to administer the program in areas of the State that are in Indian country." October 1 Decision at 2. Despite acknowledging that the relevant programs must meet "applicable requirements of the law," EPA did not evaluate whether the 26 Oklahoma environmental programs meet federal environmental requirements.

EPA also asserted that it had "no discretion to weigh additional factors in rendering its decision" beyond those provided in the text of the Rider, because the Rider "expressly abrogates any prior potentially inconsistent legal requirement or limitation of law, including any potential jurisdictional impediment to the State's regulation in Indian country or other requirement under federal environmental laws administered by EPA." October 1 Decision at 2. The October 1 Decision ignored that EPA has discretion to impose conditions on any approval of Oklahoma's request.

DISCUSSION

I. EPA's October 1 Decision Was Arbitrary and Capricious, and Contrary to Law.

Under the Administrative Procedure Act (APA), agency actions, findings, and conclusions are to be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's action is arbitrary and capricious "if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Utah Env'tl. Cong. v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). "Likewise, an agency's decision is arbitrary and capricious if the agency failed to base its decision on consideration of the relevant factors, or if there has been a clear error of judgment on the agency's part." Biodiversity Conserv. All. v. Jiron, 762 F.3d 1036, 1060 (10th Cir. 2014) (internal quotation marks omitted). The APA mandates that agencies give "reasoned explanation[s]" for the actions that they take. Am. Wild Horse Pres. Campaign v. Perdue, 873 F.3d 914, 920 (D.C. Cir. 2017).

For the reasons discussed below, the October 1 Decision was contrary to governing law, and arbitrary and capricious, thus violating the APA.

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A. EPA ignored well-established precedent indicating that the Rider has expired, and it failed to provide any reasoned explanation for why it believed that the Rider remains in effect.

As an initial matter, the October 1 Decision violated the law, and was arbitrary and capricious, because EPA granted Oklahoma's request without first evaluating whether the Rider still remains in effect. [11] As a general rule, riders in time-limited appropriation and authorizations acts are presumed to be temporary legislation, unless a rider's language clearly indicates that Congress intended it to be permanent. SAFETEA was a time-limited authorization and appropriations act because it applied only for the fiscal years 2005 to 2009. The presumption against permanence therefore applies to Section 10211 of SAFETEA. Since the Rider contains no language suggesting permanence, it expired in 2009.

Moreover, EPA failed to apply the principle that statutes must be construed in favor of Indians. This principle further supports the conclusion that the Rider has expired.

EPA's failure to consider and apply these legal presumptions was arbitrary and capricious and contrary to law.

i. A rider in a time-limited appropriation and authorization act is presumed to be effective only for the time period that the act is in effect, unless the rider's language clearly indicates that it is intended to be permanent.

There is a "very strong presumption" that if a rider in a time-limited appropriations or authorization act changes substantive law, it does so only for the fiscal years that the act is in effect. Bldg. & Const. Trades Dep't, AFL-CIO v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992); see, e.g., Tin Cup, LLC v. U.S. Army Corps of Eng'rs, 904 F.3d 1068, 1072–73 (9th Cir. 2018) ("An appropriation of funds is generally not permanent or available continuously without an express provision. The same rule applies to provisions of appropriations acts altering substantive law.") (citation omitted); Atl. Fish Spotters Ass'n v. Evans, 321 F.3d 220, 224 (1st Cir. 2003) ("A provision in an annual appropriations bill presumptively applies only during the fiscal year to which the bill pertains."); Security Clearances at DOE, B-248926, 1992 WL 130552, at *3 (May 29, 1992) ("A general rule regarding construction of annual authorization and appropriations acts is that, absent a clear expression of permanence, material contained therein—even material of general applicability—is effective only for one year."); see also State Department – Assistance for Lebanon, B-303268, 2005 WL 41632, at *3–4 (Jan. 3, 2005) (applying presumption to authorization act but finding that it had been overcome by clear statutory language); Peter Raven-Hansen & William C. Banks, Pulling the Purse Strings of the Commander in Chief, 80 Va. L. Rev.

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[11] Prior to the October 1 Decision, the Pawnee Nation requested that EPA provide documentation and authority showing that Section 10211 is still in effect. EPA failed to provide any such support. In its summary report on tribal consultation, EPA stated—without any analysis—that "EPA has found no evidence . . . that indicates section 10211 has sunset and is therefore no longer valid." EPA Summary Report at 13. This dismissal of the issue ignores the presumption against permanence and the language of the statute, which indicate the Rider expired in 2009.

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833, 876 (1994) (substantive provisions contained in single-year appropriation and authorization acts "are presumed effective only for the fiscal year").

Courts recognize that this presumption sets a "high" bar that is difficult to overcome. Atl. Fish Spotters Ass'n, 321 F.3d at 225. The presumption against permanence can only be rebutted if "[the rider's] language clearly indicates that it is intended to be permanent." Martin, 961 F.2d at 274; see Atl. Fish Spotters Ass'n, 321 F.3d at 224 ("Congress may create permanent, substantive law through an appropriations bill only if it is clear about its intentions"). The mere fact that a rider has no express expiration date does not rebut the presumption. Martin, 961 F.2d at 273–74.

The "crucial" factor for assessing whether the presumption against permanence has been overcome looks to whether there is statutory language indicating "futurity", such as "hereafter" or "henceforth". Office of the General Counsel, U.S. General Accounting Office, Principles of Federal Appropriations Law 2-86–91 (4th ed. 2016) (GAO Principles).[12] "Given the strong presumption against appropriations acts enacting permanent changes in substantive law," courts often find that "the absence of a clear statement of futurity" in appropriation or authorizations acts is "dispositive" as to the rider's temporary nature. Tin Cup, LLC, 904 F.3d at 1075 ("[W]e require a clear statement of futurity in order to give permanent effect to a provision of an appropriations act.").

In some situations, courts also consider other factors such as: (a) legislative history, (b) the inclusion of the provision in the U.S. Code, and (c) non-inclusion of a provision in future acts. GAO Principles at 2-89–90. These additional considerations play a secondary role to the "words of futurity" factor and are used for the most part only to support a conclusion that is based primarily on the absence or presence of words of futurity. Id. at 2-92.

The presumption against permanence reflects important policy goals: while appropriation and authorization riders are permitted, there are strong reasons to disfavor them. Policymaking through the appropriations process is conducted without the benefit of review by the authorizing committee with appropriate subject expertise. Neal E. Devins, Regulation of Government Agencies Through Limitation Riders, 1987 Duke L.J. 456, 464–65 (1987). And such riders can undermine public confidence because they are most often added on the application of one member or a small group, and may not embody any considered policy preference reflecting a true consensus of Congress. Will Tress, Lost Laws: What We Can't Find in the United States Code, 40 Golden Gate U. L. Rev. 129, 141 (2010); see Sandra Beth Zellmer, Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis, 21 Harv. Envtl. L. Rev. 457, 510 (1997). The "controversy surrounding [these riders] is longstanding" because of "the deeply entrenched nature of the perverse political incentives created by appropriations legislation." Richard J. Lazarus, Congressional Descent: The Demise of Deliberative Democracy in Environmental Law, 94 Geo. L.J. 619, 637 (2006).

All of these considerations point to the expiration of the Rider prior to Oklahoma's 2020 request.

[12] Available at https://www.gao.gov/legal/appropriations-law/red-book.

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ii. The presumption against permanence applies to Section 10211 of SAFETEA, and this presumption cannot be rebutted.

Under the above standards, Section 10211 of SAFETEA should be presumed to be temporary legislation that did not remain in effect after fiscal year 2009.

SAFETEA was an appropriation and authorization transportation act that authorized and provided funding for a five-year period, fiscal years 2005 to 2009 only. These authorizations and appropriations were explicitly intended to be temporary, and they expired after fiscal year 2009. See, e.g., SAFETEA, Section 1101(a), 119 Stat. 1144, 1153–56 (authorizing specific sums to be appropriated for various Federal-aid highway programs for fiscal years 2005 to 2009); Section 1103(a)(1), 119 Stat. 1144, 1161 (authorizing specific appropriations for administrative expenses of the Federal Highway Program for fiscal years 2005 to 2009); Section 1114(e)(2), 119 Stat. 1144, 1174–75 (providing appropriations for particular bridge activities for fiscal years 2005 to 2009); Section 2001(a), 119 Stat. 1144, 1519–20 (authorizing appropriations for highway safety and other related programs for fiscal years 2005 to 2009); Section 4101(a), 119 Stat. 1144, 1714 (similar for Motor Carrier Safety programs); Section 5101(a), 119 Stat. 1144, 1779 (similar for research and other programs); Section 7125, 119 Stat. 1144, 1908–09 (authorizing and providing appropriations related to hazardous materials preparedness for fiscal years 2005 to 2008). SAFETEA therefore was temporary legislation that expired in 2009.[13]

SAFETEA's temporary nature is also confirmed by the fact that, after SAFETEA expired in 2009, Congress had to pass shorter-term SAFETEA extension acts in order to continue providing reauthorization and funding for transportation past September 30, 2009. See, e.g., Legislative Branch Appropriations, 2010, Pub. L. No. 111-68, 123 Stat. 2023 (Oct. 1, 2009); Department of the Interior – Appropriation, 2010, Pub. L. No. 111-88, 123 Stat. 2904 (Oct. 30, 2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409 (Dec. 19, 2009); Temporary Extension Act of 2010, Pub. L. No. 111-144, 124 Stat. 42 (Mar. 2, 2010). Once these extensions themselves expired, Congress replaced SAFETEA with another transportation authorization and appropriations act, the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, 126 Stat. 405 (July 6, 2012). MAP-21 was also temporary legislation, and it was duly replaced by the Fixing America's Surface Transportation Act (FAST Act), Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015).

Because SAFETEA itself is temporary, the Rider should be presumed to be temporary and to apply only for the 5-fiscal year period that the act was in effect. See, e.g., The Honorable John Edward Porter: House of Representatives, B-271412, 1996 WL 335238 (June 13, 1996) (provision in appropriations act applied only for the act's 2-fiscal year period); Martin, 961 F.2d at 273–74;

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[13] See, e.g., News Release, U.S. Dep't of Transp., $48.8 Billion In Highway Funds Now Available To States Annual Apportionment, Restored Dollars Will Enable States To Make Longer-term Plans, DOT 73-10 (Apr. 21, 2010) ("SAFETEA-LU expired September 30, 2009 . . ."); U.S. Int'l Trade Comm'n, Prestressed Concrete Steel Rail Tie Wire from China, Mexico, & Thailand, USITC Inv. No. 731-TA-1207 (June 1, 2013) ("SAFETEA-LU . . . had expired in September of 2009.").

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Atl. Fish Spotters Ass'n, 321 F.3d at 224; B-248926 (provisions in authorization and appropriations acts are temporary, absent a clear expression of permanence).

This presumption cannot be overcome because Section 10211(a) contains no language suggesting permanence. Tin Cup, LLC, 904 F.3d at 1075. The absence of the word "thereafter" is particularly telling. Martin, 961 F.2d at 274; GAO Principles at 2-89. Thus, the fact that the Rider does not have an express sunset provision is of no consequence here. Martin, 961 F.2d at 274 (rejecting argument that an appropriations rider was permanent legislation because the rider had no expiration date apparent on its face).[14]

The absence of words of futurity is dispositive, see Tin Cup, LLC, 904 F.3d at 1074–75, and establishes that the Rider was temporary. But several other factors also show that the presumption cannot be rebutted.

For example, the Rider was not codified in the U.S. Code or included in the historical and statutory notes in the U.S. Code, which indicates that it is only temporary. The "inclusion of a provision in the United States Code is relevant as an indication of permanence." GAO Principles at 2-90. As a general matter, provisions that are temporary are often not codified in the U.S. Code and do not appear in the Code notes. See Tress, Lost Laws, 40 Golden Gate U. L. Rev. at 130 ("Many enacted laws are left out of the Code entirely—even though of general applicability—because they are considered temporary."); id. at 164 ("General laws that are considered temporary, such as those included in appropriations acts, are left out of the Code entirely.").

Other SAFETEA provisions underscore this point. In the same title of SAFETEA where the Rider appears (Title X of SAFETEA), several other sections did amend the U.S. Code. See, e.g., SAFETEA, Sections 10141, 10142, 10143, 10208. The different treatment of the Rider indicates Congress did not intend it to permanently change the law. See Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted) (alteration in original).

In addition, there is no legislative history suggesting a clear intent by Congress to make the Rider permanent. Indeed, there seems to be no legislative history relevant to Section 10211(a) at all.

Moreover, Congress did not include the Rider in subsequent transportation bills. "[T]he failure to repeat in subsequent appropriation acts a provision that does not contain words of futurity can . . . be viewed as an indication that Congress did not consider it to be permanent and simply

[14] The words "[n]otwithstanding any other provision of law" are not words of futurity and, standing alone, offer no indication as to the duration of the Rider. See Martin, 961 F.2d at 274 (the words "notwithstanding any other provision of law" in the rider "goes to the breadth of the amendment's effect, not its duration"); GAO Principles at 2-88 (citing Letter, B-271412, 1996 WL 335238 (June 13, 1996); Nat'l R.R. Passenger Corp. (Amtrak): Permanency of Language in Appropriations Act, B-208705, 1982 WL 28676 (Sept. 14, 1982)).

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did not want it to continue." GAO Principles at 2-89. As noted above, SAFETEA was replaced by another transportation appropriation and authorization act. MAP-21, Pub. L. No. 112-141, 126 Stat. 405 (replaced SAFETEA); see also FAST Act, Pub. L. No. 114-94, 129 Stat. 1312 (replaced MAP-21). Section 10211's language was not included in either MAP-21 of the FAST Act. See generally MAP-21, Pub. L. No. 112-141, 126 Stat. 405 (not referencing Section 10211 of SAFETEA or incorporating its language); FAST Act, Pub. L. No. 114-94, 129 Stat. 1312 (same). This further suggests that Section 10211, which contains no words of futurity, is no longer in effect.

Finally, the opaque manner in which the Rider was adopted makes it particularly important to apply the presumption against permanence. The Rider was a last-minute addition to the SAFETEA bill, inserted after the House and Senate had agreed on the bill's final version and without consideration by the Senate Indian Affairs Committee.[15] Neither the affected tribes nor EPA received notice of the Rider.[16] The Rider, in fact, embodies the problems with using appropriations bills to substantively change the law. This is exactly the kind of midnight rider that should not be deemed permanent absent a clear indication of Congressional intent. See, e.g., Minis v. United States, 40 U.S. 423, 445–46 (1841). There was no such indication here.

This conclusion is further reinforced by the principle that statutes must be construed in favor of Indians. Cohen's Handbook of Federal Indian Law § 2.02[1] at 113 (2012 ed.).

In sum, the Rider expired prior to Oklahoma's 2020 request. EPA's failure to analyze whether the Rider was still in effect, to consider the presumption against permanence, and to consider the principle that statutes must be construed in favor of Indians, was arbitrary and capricious and contrary to law.

B. Even if the Rider remains in effect, the October 1 Decision violated the Rider's requirements.

Even if EPA assumes the Rider remained in effect, the October 1 Decision was unlawful because it violated the requirements of the Rider.

The Rider provides that, in approving Oklahoma's request, EPA must determine both that: (a) EPA "approve[d] the State to administer the State program under the [federal environmental] law with respect to" non-Indian lands, and (b) the Oklahoma program "meets applicable requirements of the law." Pub. L. No. 109-59, 119 Stat. 1144, 1937. EPA made the first finding—that it had previously approved Oklahoma to administer on non-Indian lands the 26 programs covered by Oklahoma's request—but failed to make the second finding. October 1 Decision at 2.

Instead of evaluating whether Oklahoma is administering the 26 programs in accordance with the relevant laws, EPA asserted that if a state program met requirements "at the time the program was previously approved outside of Indian country," then no further determination regarding current compliance with the law was necessary. October 1 Decision at 2 n. 2. This is contrary to the plain language of Section 10211(a), which treats the requirement that Oklahoma

[15] See supra at 4.
[16] Id.

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programs must "meet[ ] applicable requirements of the law" as an additional and separate requirement from EPA's prior approval of the program on non-Indian lands. By conflating the two requirements, EPA essentially rendered the second one superfluous and meaningless. After all, if Oklahoma did not meet the requirements of the law at the time the program was approved outside of Indian country, then EPA would not have approved the program in non-Indian lands to begin with. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotation marks and citation omitted).

EPA's failure to determine whether the 26 Oklahoma programs meet applicable laws is troubling because evidence suggests that the Oklahoma Department of Environmental Quality (ODEQ) is not living up to its responsibilities under at least some of the delegated environmental programs. For example, a 2020 EPA review of Oklahoma's CAA implementation in fiscal year 2018 revealed that "significant issues" and "routine and/or widespread performance issues" were found regarding Oklahoma's CAA programs.[17] In reviewing states' CWA, CAA, and RCRA programs, EPA categorizes states' performance into three levels. An "Area for Improvement" finding means:

> Significant issues are found. One or more metrics indicates routine and/or widespread performance issues related to quality, process, or policy. A recommendation for corrective action is issued which contains specific actions and schedule for completion. The EPA monitors implementation until completion.[18]

For Oklahoma's CAA program, EPA's review found two Areas for Improvement. These were:

> (1) ODEQ continues to have considerable time elapse before reporting high priority violations (HPVs).
> (2) As in the past, the state agency tends to require longer than the goal of 180 days to address HPVs. Further, the records maintained do not appear to fully satisfy the requirements of the case development and resolution timeline.[19]

As EPA recognized, these two issues regarding reporting and addressing high priority violations are significant. Moreover, these were not one-off issues, but "continue[d]" problems. This instance highlights the necessity of a full evaluation of whether Oklahoma's 26 programs are each meeting all legal requirements.

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[17] EPA Region 6, Final Report: State Review Framework, Oklahoma, Clean Water Act and Clean Air Act Implementation in Federal Fiscal Year 2018 and Resource Conservation and Recovery Act Implementation in Federal Fiscal Year 2019 (June 22, 2020), https://www.epa.gov/sites/production/files/2020-08/documents/srf-rd4-rev-ok.pdf.

[18] Id. at 3.

[19] Id. at 7, 21, 30.

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In addition, a 2019 EPA evaluation of ODEQ's CAA Title V permitting program discusses a variety of ways in which ODEQ is not fully living up to its obligations.[20] For example, regarding whether ODEQ is issuing permits that are consistent with the requirements of 40 C.F.R. § 70, EPA raised several different concerns about ODEQ's failure to thoroughly document its decisions during the Title V permit writing process. Regarding ODEQ's compliance with the public participation requirements for Title V permit issuance, EPA noted concerns about ODEQ's failure to ensure that its permit issuance process implementation fully satisfies 40 C.F.R. § 70.7(d)(1)(v) and failure to ensure that applicants applying for Title V minor permit modifications certify that the proposed modifications meet the Title V minor modification criteria. The significant and numerous concerns listed by EPA further illustrate why the agency should have evaluated all of Oklahoma's programs before granting the state's request.

Assessing the 26 environmental programs' performance is important not only for compliance with the Rider, but also to fulfill EPA's trust responsibilities to tribes. Oklahoma's power grab under SAFETEA has far-reaching impacts across Oklahoma, and deficiencies in state programs could have significant adverse impacts on Indian lands, natural resources, and tribal members. Issuance of the October 1 Decision without considering this important factor was arbitrary and capricious and contrary to law.

C. EPA ignored its authority to impose conditions on any approval of Oklahoma's request.

The October 1 Decision was arbitrary and capricious and unlawful for a third reason: EPA wrongly treated its decision as a mere ministerial task where it had "no discretion . . . in rendering its decision" beyond applying the factors listed in the text of the Rider. October 1 Decision at 2. This position ignores governing caselaw interpreting Section 10211.

The U.S. Court of Appeals for the District of Columbia Circuit has recognized that Section 10211 leaves EPA with discretion to impose conditions on an approval of Oklahoma's requests pursuant to SAFETEA. See Oklahoma Dep't of Envtl. Quality v. EPA, 740 F.3d at 190 (EPA could impose conditions when approving state's request under the Rider). By recognizing that EPA could attach such conditions, the D.C. Circuit made clear that EPA retains some discretion in making decisions under the Rider, and that those decisions are not merely ministerial. EPA's October 1 Decision completely ignored this law.

EPA should have exercised its discretion by considering whether to attach conditions to an approval of Oklahoma's sweeping request for authority. For example, in requesting consultation, the Pawnee Nation suggested that EPA could direct Oklahoma to negotiate an intergovernmental agreement or memorandum of understanding with the tribe on how the affected programs would be administered on Pawnee jurisdictional lands. EPA disregarded this suggestion and ignored the

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[20] EPA Region 6, Oklahoma Department of Environmental Quality Air Quality Division, Title V Operating Permit Program Evaluation (June 18, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/2019_06_20_final_title_v_odeq_evaluation_report_with_transmittial_letter_and_summary_06202019.pdf.

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Oklahoma Dep't of Envtl. Quality precedent. EPA's failure to even consider this issue, and its failure to provide a reasoned explanation for not imposing conditions, were arbitrary and capricious.

D. EPA failed to provide public notice and comment, engage in any meaningful government-to-government consultation with tribes, or analyze the environmental impacts of its approval prior to approving Oklahoma's request.

EPA also disregarded several legal requirements that apply to the EPA's approval of state environmental programs: consultation with tribes, public notice and comment, and preparation of a NEPA analysis. These mandates are not overridden by the "notwithstanding any other provision of law" language in the Rider, because EPA can comply with these procedures while still satisfying the Rider's directive that the Oklahoma request "shall be approved" if certain terms are met.

Moreover, because EPA has discretion to impose conditions on any approval of Oklahoma's request, notice and comment, consultation, and NEPA play a valuable role in informing EPA's consideration of what conditions to require. These procedures can also assist EPA in determining whether Oklahoma's implementation of the 26 programs is in compliance with the law.

i. EPA provided no public notice and comment.

First, the October 1 Decision was arbitrary and capricious, and contrary to law, because EPA failed to provide public notice and comment opportunities as required for many of the 26 environment programs.

The October 1 Decision affects federal environmental laws that are administered by EPA, but which provide that EPA can approve states to implement them in the states' respective jurisdictions. See, e.g., 42 U.S.C. § 7410 (CAA state implementation plans). When considering applications by a state for approval, EPA is required to provide public notice and an opportunity to comment, as well as a public hearing. For example, for approval of certain state programs under the CWA, EPA must publish notice of the state's application in the Federal Register, allow no less than 45 days for public comment, and hold a public hearing before approving the application. 40 C.F.R. § 123.61. Similar requirements apply under other statutory programs, including the CAA, 40 C.F.R. § 70.4(i), the RCRA, 40 C.F.R. §§ 239.10, 271.20, SDWA, 42 U.S.C. §§ 300g-2, 300h-1; 40 C.F.R. § 145.31, and TSCA, 15 U.S.C. § 2684.

EPA ignored these requirements. It did not publish notice of a proposed decision in the Federal Register, provide a public comment period, or hold a public hearing, prior to making the October 1 Decision. This failure was arbitrary and capricious and contrary to law.

ii. EPA failed to engage in government-to-government consultation with tribes.

Second, EPA made no meaningful effort to engage in government-to-government consultation with the Pawnee Nation and other Oklahoma tribes affected by its decision. In doing

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so, EPA disregarded its own tribal consultation policies and NEPA's consultation requirement. See infra Part I.D.iii. This was not only arbitrary and capricious, and contrary to law, but also violated the agency's trust responsibility.

The federal government and its agencies, including EPA, have a trust obligation that requires the government to act in the best interest of Indian tribes. See United States v. Mitchell, 463 U.S. 206, 225–26 (1983). The trust obligation requires federal agencies such as EPA to consult with a tribe when an agency decision may have adverse impacts on tribes. Executive Order 13175 directs federal agencies to "establish regular and meaningful consultation and collaboration" with tribal officials when developing policies or actions that affect a tribe. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). The Order recognizes that "Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights." Id. § 2(b). On January 26, 2021, President Biden issued a Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, which reaffirmed the policy announced in Exec. Order No. 13175 and promised that "[i]t is a priority of [the Biden] Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy." 86 Fed. Reg. 7491 (Jan. 26, 2021).

EPA procedures on consultation require it to "notify a Tribe or Tribes of the opportunity to consult as early as possible to enhance meaningful discussion." EPA, Consultation And Coordination With Federally Recognized Indian Tribes: EPA Region 6 Consultation and Coordination Procedures (May 2015) at 5 (Region 6 Consultation Procedures); see also EPA, EPA Policy on Consultation and Coordination with Indian Tribes at 5 (May 4, 2011) ("Notification should occur sufficiently early in the process to allow for meaningful input by the tribe(s)."). EPA's procedures also direct that it must "[i]f requested, provide maps, technical data, and other explanatory or supporting information as appropriate and available" so that the tribe has sufficient information to meaningfully consult. Region 6 Consultation Procedures at 6.

Despite sending the Pawnee Nation copies of the agency's consultation procedures, EPA did not follow those policies. For example, EPA did not "notify a Tribe or Tribes of the opportunity to consult as early as possible to enhance meaningful discussion." Region 6 Consultation Procedures at 5. EPA took five weeks just to notify the Pawnee Nation of Oklahoma's July 22, 2020 request, and then terminated its consultation efforts only three weeks after providing that notice. A three-week "consultation period" was grossly inadequate for a decision with such far-reaching implications on the Pawnee Nation and other tribes. Moreover, apart from a preliminary September 18, 2020 conference call involving numerous tribes, EPA declined to hold any meetings with the Pawnee Nation, despite the Nation's request.

EPA also disregarded its policy directing it to "provide maps, technical data, and other explanatory or supporting information as appropriate and available" when requested by tribes. Region 6 Consultation Procedures at 6. After receiving a copy of EPA's procedures, the Pawnee Nation requested a variety of additional information about the geographic and regulatory scope of Oklahoma's request, and other legal and factual issues necessary for meaningful and informed

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consultation. EPA provided no response to those requests before terminating its consultation efforts on September 15, 2020.

EPA's approach violated the federal government's trust responsibility to the Pawnee Nation and other Oklahoma tribes, and was arbitrary and capricious and contrary to law. See Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979) ("[f]ailure of the [agency] to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking . . . but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with" tribes) (internally quotation marks and citations omitted); Cheyenne River Sioux Tribe v. Jewell, 205 F. Supp.3d 1052, 1058 (D.S.D. 2016) ("[M]eaningful consultation requires, at a minimum, that defendants comply with federal statutes and their own policies defining what constitutes adequate 'consultation.'"); Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) (same); Cedar Band of Paiutes v. U.S. Dep't of Housing and Urban Dev., No. 4:19-cv-30-DN-PK, 2019 WL 3305919, **7–8 (D. Utah July 23, 2019) (same).

iii. EPA failed to prepare a NEPA analysis.

Lastly, EPA did not prepare any NEPA analysis assessing the reasonably foreseeable impacts of its October 1 Decision to air, water, land and other resources protected under the relevant environmental programs. This was improper.

Congress enacted NEPA to, among other things, "encourage productive and enjoyable harmony between man and his environment" and to promote efforts "which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA requires all federal agencies, including EPA, to take a hard look at the environmental consequences of their proposed actions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). In doing so, an agency must identify and disclose to the public the reasonably foreseeable impacts of a proposed action.

NEPA serves two goals. First, by requiring the agency to consider environmental impacts in advance, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Id. at 349. Second, NEPA requires "broad dissemination of relevant environmental information" so that the public can comment on and effectively participate in agency decision making. Id. at 350.

If an action may have a significant impact on the environment, NEPA requires the agency to prepare an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C). Where the impacts of a project are not significant, or the agency is uncertain about their significance, it may prepare a shorter analysis called an environmental assessment (EA). NEPA also requires federal agencies to consult "early" with tribal governments about a proposed action. 40 C.F.R. § 1501.2.

EPA did not do any NEPA analysis before it approved Oklahoma's request. EPA also ignored NEPA's consultation requirement, by taking five weeks just to notify the Pawnee Nation of Oklahoma's request and then terminating its consultation efforts three weeks later.

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EPA took the position that NEPA did not apply because under SAFETEA, it "lack[s] authority to consider environmental impacts." EPA Summary Report at 8 (citing Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007)). Nat'l Ass'n of Home Builders, however, is inapposite because it involved a Clean Water Act provision that left EPA with no discretionary involvement or control. 551 U.S. at 673. In contrast, Oklahoma Dep't of Envtl. Quality ruled that Section 10211 leaves EPA with discretion to impose conditions on approval of Oklahoma's request. 740 F.3d at 190. Environmental impacts represent an important consideration when evaluating such conditions. EPA should have therefore conducted a NEPA analysis and followed NEPA's consultation requirements.

II. EPA Should Withdraw the October 1 Decision, and Review and Reconsider Oklahoma's SAFETEA Request with a Full Process That Complies with the Law.

As discussed above, EPA's October 1 Decision was contrary to governing law and arbitrary and capricious for multiple reasons.

The Pawnee Nation therefore asks that EPA promptly withdraw the October 1 Decision, and review and reconsider Oklahoma's request under SAFETEA with a full and robust process that complies with the law and addresses the interests of tribal nations and the public.

That process should include full government-to-government consultation with affected Oklahoma tribes pursuant to EPA policies, Exec. Order No. 13175, and President Biden's January 26, 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. The process should also include a public comment period and preparation of a NEPA analysis. Under the Executive Order, to be "meaningful" the consultation must take place before EPA's decision is made, not afterward; and that is why EPA should withdraw the October 1 Decision before government-to-government consultations begin. Exec. Order No. 13175, 65 Fed. Reg. at 67,249–50.

Moreover, EPA should evaluate whether Section 10211 of SAFETEA is still in effect, including addressing the presumption against permanence that applies to appropriation and authorization riders such as Section 10211 and the principle that SAFETEA must be construed to favor the Pawnee Nation and other tribes. We believe such an assessment will show that the Rider has expired and thus Oklahoma's request must be denied.

The Pawnee Nation also asks that EPA's review address whether, for each of the programs covered by the October 1 Decision, Oklahoma's program meets the applicable requirements of the relevant federal environmental law, as mandated by SAFETEA. In addition, the review should address what regulatory gaps exist across different state and tribal programs and in different parts of the state where different tribal nations have jurisdiction.

Finally, EPA should consider and impose appropriate conditions on any new approval of Oklahoma's request, pursuant to Oklahoma Dep't of Envtl. Quality v. EPA, 740 F.3d at 190. For example, as a condition for approval, EPA could direct Oklahoma to negotiate an intergovernmental agreement or memorandum of understanding with individual tribes regarding

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how the relevant programs would be implemented. The Pawnee Nation would welcome the opportunity to coordinate with EPA regarding potential appropriate conditions.

CONCLUSION

Thank you for your consideration of these comments. If you have any questions or need further information, please feel free to contact President Walter Echo-Hawk of the Pawnee Nation ((303) 746-5836, wechohawk@pawneenation.org), or Michael Freeman, counsel for the Pawnee Nation ((303) 996-9615, mfreeman@earthjustice.org).

Sincerely,

Michael S. Freeman
Rumela Roy
Earthjustice
633 17th Street, No. 1600
Denver, CO 80202

Counsel for the Pawnee Nation of Oklahoma

Cc:
JoAnn Chase
David Gray
Meghan Greenfield
Walter Echo-Hawk
Chad Smith

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